2001

State of Utah, Plaintiff, Appellee vs. John Winston Bangerter, Defendant, Appellant : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee,

vs.

JOHN WINSTON BANGERTER,

Defendant / Appellant.

Case No.: 20010039-CA

BRIEF OF APPELLANT

Defendant / Appellant appeals the Judgment, Stay of Imposition of Sentence, and Order of Probation for Possession of a Controlled Substance, a 3rd Degree Felony, entered [redacted] 2000, in the Fifth Judicial District Court of Washington County, [redacted]; the Hon. S. Shumate presiding.

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in the matter, pursuant to Section 8-2a-3 (2) (f), Utah Code Annotated, 1953, as amended.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW (PRESERVATION OF APPEAL ON THE RECORD)

ISSUE NO. 1

The Affidavit, and the Search Warrant it supports, fail to meet statutory and case law requirements for probable cause and the Court erred in denying Defendant's / Appellant's Motion to Quash Search Warrant and Suppress Evidence. Preserved for appeal at [R. 55–71, 136]

The standard for review of a magistrate's finding of probable cause for the issuance of a search warrant was stated in *State v. Thurman*, 846 P.2d 1256, 1259-1260 (Utah 1993) (citations and footnotes omitted);

> In reviewing the magistrate's finding of probable cause to support a search warrant based on an affidavit, we will find the warrant invalid only if the magistrate, given the totality of the circumstances, lacked a "substantial basis" for determining that probable cause existed. . . . In conducting this review, we will consider the search warrant affidavit in "its entirety and in a common-sense fashion" and give "great deference" to the magistrate's decision. .. . The affidavit must support the magistrate's decision that there is a "fair probability" that evidence of the crime will be found in the place or places named in the warrant.

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a final order of Judgment and Sentence for one count of possession of a controlled substance, a 3rd Degree Felony. This conviction is based upon Appellant's conditional plea of guilty, to said charge, to enable him to appeal the Trial Court's denial of his Motion to Quash the Warrant and Suppress the Evidence.

STATUTES AND CONSTITUTIONAL PROVISIONS

[U.S.C. 18 §] 3109, Section 8-2a-3 (2) (f), Utah Code Annotated, 1953, as amended. section 77-23-203, Utah Code Annotated (1953 as amended), section 77-23-210, Utah Code Annotated (1953 as amended): The Fourth Amendment of the U.S. Constitution. Utah Const., art, I, § 14.

STATEMENT OF FACTS

On the 3rd day of February, 2000, Officer R. Chris Trani, of the Washington County Drug Task Force, drafted a Search Warrant, and an Affidavit in support thereof, for a dwelling located at 462 South, 100 West, St. George, Utah. The Warrant also included associated out buildings and vehicles, along with the persons: John Winston Bangerter, and Justin Grant Bangerter. Said search warrant application was presented to the Honorable James L. Shumate, a Judge of the Fifth Judicial District Court of Washington County, State of Utah. Said application was approved, and a day or night, no notice, search was authorized. The Search Warrant was executed, on or about, the 8th day of February, 2000, resulting in the discovery of several items of contraband.

The Affidavit in support of the search warrant contains information allegedly from three sources, two of which are confidential, giving information directly to the police. These sources, allegedly, are also the conduit through which other sources funneled information to the police and which are included in the Affidavit. The confidential sources, and their relationship to the suspects, "were intentionally kept vague in order to protect their identities."

The "No Notice", and "Night Time Entry", authority in the Search Warrant is supported only by this same affidavit. [R. 11–13] [R. 5–10]

The Affidavit, and the Search Warrant, both issued on February 3, 2000, at 22:16 hours, and the Search Warrant was executed on February 8, 2000 at 0523 hours. [R. 9, 12]

SUMMARY OF ARGUMENTS

We have, in this affidavit, if you read it quickly, what looks like, woe boy, there is so much grist in this thing; it's so packed with facts and information; this is one of the best affidavits for a search warrant I have ever seen. But, if you carefully look at it, take it apart, if you will, there is nothing there. It's a group of people, exercising the right of peaceful assembly, being accused of involvement in a common criminal enterprise by a string of faceless accusers. Guilt by association!

All of the incriminating facts come from two confidential sources. Confidential Source #1 had never been in the residence and had been told by two other sources that drug activity was going on in that residence. These second

tier sources were known only to Confidential Source #1, and not to the police, who could not verify their existence; let alone, their veracity. [R. 6–7]

Confidential Source # 2 told a Detective Randall about a suspected methamphetamine lab in the trunk of a car owned by Delanie Drake. Delanie Drake's car was seen at the Bangerter residence on Feb 2, 2000 between 11:30 P.M. and 2:00 A.M. However, that was not the car which, according to Confidential Source #2, was equipped with a drug lab. Confidential Source #2 was quoted in the affidavit in such a way that does not inform the reader that any of the information is from first hand knowledge. [R. 7]

ARGUMENT

POINT I

THE AFFIDAVIT FOR SEARCH WARRANT FAILS TO CITE SUFFICIENT FACTS TO ESTABLISH THE RELIABILITY OF THE INFORMANTS, OR THEIR INFORMATION.

Two copies of the Affidavit in Support of Search Warrant appear in the record; one as [R.5–10], and the second as [R.68–71]. For purposes of clarity, the second copy, [R.68–71], will be used, as its paragraphs have been numbered (1 through 11) by this author, for reference purposes. Said affidavit contains two (2) sections (numbered *5* & 6) pertaining to probable cause for the issuance of the Search Warrant.

Quoting *State of Utah v Singleton,* 854 p.2d 1017, 214 Utah Adv. Rep. 30 (App 1993):

> The test for the sufficiency of an affidavit supporting a search warrant, under the Fourth Amendment, is set forth in Illinois V. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983)...

I*fn5 See Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964). The two-pronged test required the affidavit to set forth sufficient underlying circumstances to establish both (1) the basis of knowledge of the informant, and (2) the informant's veracity and reliability. See *Gates,* 462 U.S. at 228-29, 103 S. Ct. At 2327.1

Utah has applied the totality-of-the-circumstances analysis when determining whether an affidavit sets forth facts sufficient to establish probable cause under the Fourth Amendment. See, e.g., *Thurman*, 203 Utah Adv. Rep. At 19-20; State v Hansen, 732 P.2d 127, 130-3 1 (Utah 1987); White, 210 Utah Adv. Rep. At 60-61.

Utah courts, however, have used the Aguilar-Spinelli factors as guides in applying the totality-of-the-circumstances test. "An informant's 'reliability' and 'basis of knowledge' are but two relevant considerations, among others, in determining the existence of probable cause under 'a totality-of-the circumstances." *Hansen*, 732 P.2d at 130 (citing *Gates,* 462 U.S. at 23 1-32, 235-36, 103 S. Ct. At 2328-3 1). See also *State v. Purser*, 828 P. 2d. 515, 517 (Utah App. 1992).

The *Aguilar-Spinelli* guidelines are not applied as "strict, independent requirements to be 'rigidly exacted' in every case. A weakness, in one or the other, is not fatal to the warrant so long as, in totality, there is substantial basis to find probable cause." *Hansen*, 732 P.2d at 130 (citing *Gates*, 462 U.S. at 238, 103 S. Ct. At 2332). Thus, the significance of each factor involved in finding of probable cause differs on a base-by-case basis. *See id.; Purser*, 828 P2d. At 517.

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband, or evidence of a crime, will be found in a particular place. The duty of reviewing court is simply to ensure that the magistrate had a "substantial basis for.... concluding" that probable cause existed. *Gates* (quoting *Jones v. United States,* 362 U.S. 257, 271, 80 S. Ct. 725, 736 (1960)).

The following is a paragraph by paragraph analysis of Sections *5* & 6 (all

of the probable cause information contained in the affidavit in Support of Search Warrant in this case) using the number designation placed on each paragraph by this author.

Paragraph 1: The confidential source told the information to the officer on February 3, 2000, but the affidavit does not state when the source(s) of the confidential source saw the activities, or learned the information:

Therefore, that paragraph presents the following three (3) problems:

There is nothing in the affidavit regarding the reliability of the C. S's source(s), (2) the information is double hearsay, and (3) the reader has no way of knowing when the C. S.' s source saw the activities, or learned the information; it could have been months, or years, before. Therefore, there is no way to determine whether staleness is a factor in the information given, thereby precluding it from being reliable it terms of probable cause.

Paragraph 2: This paragraph presents the same three (3) problems as paragraph "1".

Paragraph 3: The affidavit never states that C.S #1 was ever in the Bangerter residence, nor does it state how the source of C.S. #1 learned the information. The information in paragraph "3" is problematic; the reader cannot discern the basis for C. S. #1's conclusions; i.e., how C. S. #1 acquired the knowledge about Cornwell, the cooking and lab equipment, or how old the information is. There is nothing in the Affidavit to indicate that CS #1 had ever visited the Bangerter residence; thus, the reliability factor is again questionable when considering CS #1's "extensive" knowledge of the activities, at that residence, referred to therein. Further, it probably constitutes hearsay on hearsay. Much of the other "information" in the Affidavit (that dealing with "others' knowledge" of the Defendant), is also third party related, or related to other parties, at other locations, at other unstated times; rarely, if at all, tied to

the residence for which the warrant is sought. Finally, one can wonder if the officer was ever certain who resided at that address, as one of the classifications of items to be searched for in his "C–2" attachment, titled, ITEMS TO BE SEIZED, paragraph 4, is described as follows:

> Residency papers; to include: utility receipts and or bills, rental agreements / lease, articles showing occupancy of the premises or ownership of the premises or automobiles.

The Affidavit, with "C–2" attachment, never states that the residence is the home of, place of occupation of, or a place frequented by, the Defendant. Excepting for the mention of methamphetamine, the warrant does not provide the required specificity, or particularity, of a lawful warrant, but merely amounts to a potpourri of a laundry list of items for which to search, and places in which to search for them; in essence, a "general warrant".

Paragraph 4: This paragraph refers to an automobile not sought to be searched. Further, it states that the items were no longer in the car; that they had been discarded in the trash. This Affidavit also fails to state when the events occurred and none of the information in this paragraph ties to the Bangerter residence (lack of nexus). This paragraph, therefore, should have resulted in a warrant to search the County Dump, the ultimate destination indicated, for the items sought, by the information revealed in paragraph "4".

But, to return to the trunk of the car, and the discarded items thereof, and the officer's second hand description of them; the haphazard description of them, by Delanie's father, does little to justify the warrant, constitutionally.

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing...the...things to be seized." (*Compare* Utah Const., art, I, § 14 identical in substance and effect). The Fourth Amendment is not satisfied by

recitals which describe general categories of "things" which, though they may be made the proper subject of a search warrant, fail to command law enforcement to search for and seize items which are described with as much particularity as circumstances permit. *See generally* 2 W. LaFave, Search and Seizure § 4.6(d)(3d ed., 1996).

In this search warrant, in this case, only one item, to wit: methamphetamine, is described with particularity.

As an example, a mere reference to "the weapon used in the armed robbery" is to argue as "weapon is a generic term that could apply to a variety of instruments," and the robbery victim could surely be more specific as to the kind of weapon used. *People v Holmes*, 312 N.E.2d 748 (111. App. 1974). *See also, State v. Pennington,* 642 S. W.2d 646 (Mo.1982) (warrant for "weapon" too vague). Similarly, a description of "burglary tools" is insufficient, for they "are simply hand tools designed for lawful use until the intent to use or possess them unlawfully appears, and one man's tools resembles another's." *In re 1969 Plymouth Roadrunner,* 455 S.W.2d 466 (Mo.1970). See also, 2 LaFave, at 568, m.84 (citing numerous authorities).

To underscore the point that the items described by Delanie's father were truly generic, in paragraph 6, the officer explains the following:

"He explained to us that the vehicle with the items in the trunk belonged to him."

The officer, by including a long list of categories of things to be seized, has invalidated the search warrant.

Paragraph *5:* This paragraph ties in with paragraph "3", which is replete with problems for the State. Further, this paragraph *"5"* only has relevance if

the information in paragraph "3" (which, as pointed out, is suspect) is taken into consideration. Paragraph *5* is devoid of probable cause information.

Paragraph 6: The information in this paragraph is subject to the same defects, and lacking the same relevance, and nexus, as discussed above regarding paragraph "4" of the affidavit.

Paragraph 7: This paragraph does not state when the surveillance and observation occurred. It does not state that Delanie, and Kenyon, were in the vehicle when the officer saw it. Nor does the affidavit indicate that the vehicle contained contraband when the officers saw it. It contains no relevant probable cause.

Paragraph 8: The information in this paragraph, relating to Mr. Cornwell, is lacking in nexus to the Bangerter residence. Paragraph "3" of the affidavit contains the only tie-in to said residence and paragraph "3" is lacking in timeliness, and contains all the other problems discussed above. Said paragraph "8" fails to state what Staheli's involvement was in the other investigation and, in fact, states that he was merely "on the periphery" of that investigation. The allegation that Johnny and Grant Bangerter "have been investigated for, or suspected to be involved in, the manufacture of methamphetamine in the past" adds nothing to probable cause to search the premises at the address listed in the Affidavit. The balance of said paragraph 8 contains no probable cause for the issuance of the Search Warrant.

Paragraph 9: This paragraph attempts to tie a "Mr. Bangerter" (first name not stated) to drug activities by linking "Mr. Bangerter" to Shirl Shane Johnson, who, in November of 1999, had several cases of book matches in his truck. That paragraph also states the Mr. Johnson was stopped when leaving "Mr. Bangerter's" residence on November 29, 1999. Said information was over two (2) months old; therefore, stale. Apparently, no criminal charges were filed as a

result of the said November stop of Mr. Johnson, and there is no indication that Johnson had been in the Bangerter residence. Also, if one refers to the section in the affidavit entitled, "LOCATION OF SEARCH", the reader will discover that the affidavit does not state the names of any persons who resided at 462 South 100 West, St. George, Utah. The affidavit may contain implications that Johnny Winston Bangerter and Grant Justin Bangerter reside at that address, but it does not so state. The affidavit contains nothing to indicate that the officer did anything to determine who lived at said address, or to verify who occupied the premises thereon. As a result, said paragraph "9" is lacking in nexus between the information stated and the address given. In addition, said paragraph 9 is not productive of probable cause to search the residence.

Paragraph 10: This paragraph is conclusory, only, and is not productive of probable cause to search the residence.

Paragraph 11: The first two sentences of this paragraph are conclusory, only. The remainder of the paragraph is an attempt to establish the reliability of the two (2) sources that provided information to the officers. However, those sources obtained their information from other sources. As a result, most of the information in the affidavit is hearsay on hearsay, and nothing is stated in the affidavit about the reliability of the persons who provided the information to C.S. #1 and C.S. #2.

As a result, the affidavit must fail due to failure to contain reliable information to cause one to believe that the contraband sought to be seized would be found at the address given on February 3, 2000.

POINT II

THE INFORMATION IN THE AFFIDAVIT FOR SEARCH WARRANT IS STALE AND, AS A RESULT, DOES NOT JUSTIFY THE ISSUANCE OF A SEARCH WARRANT.

See *State v Vigh*, 871 P.2d 1030, 1033 (Utah App. 1994) (including stale info in affidavit is improper but not fatal; court will excise stale info and then determine if remaining information still demonstrates probable cause).

No dates are given of the occurrences recited in the Affidavit in Support of Search Warrant that would support probable cause for the issuance of a search warrant. In the two (2) PROBABLE CAUSE sections of said affidavit, only four (4) dates are given. Paragraph 1: Feb. 3, 2000, equals the date C.S. #1 told the officers what others had told him / her. January 29, 2000, equals the date that the person, the one informing the informant, said that the incident occurred.

Paragraph 6: Feb. 2, 2000, equals the date that Mr. Drake told the officers what vehicle Kenyon and Delanie were driving that night. The information in that paragraph does not relate to the residence sought to be searched.

Paragraph 9: November 29, 1999, equals the night that the Task Force stopped Mr. Jonson's truck, with a "Mr. Bangerter" in it, and found cases of book matches. The facts relating to the first two (2) dates are not probative of probable cause to search, because we don't know when the informant claimed the events occurred. We don't know whether that information is fresh, or old. Therefore, said information should not be considered in determining whether, or not, sufficient probable cause is produced by the Affidavit.

The remaining two dates do not tie to 462 South 100 West, St. George, Utah.

Once this court excises the unreliable information from the Affidavit (that is hearsay on hearsay, with nothing stated to support the reliability of the original source, and the information that must be deemed stale, because the reader cannot determine when the events occurred) there is little, or nothing, left in the Affidavit to support probable cause to search.

Also, absent such unreliable, and /or stale, information, there is insufficient information in the affidavit to support a nexus between the remaining facts and the officer's belief that controlled substances, laboratory equipment, drug precursors, paraphernalia, records of drug possession, purchase, or drug manufacturing, instructions would be found on the premises described as 462 South 100 West, St. George, Utah.

For these reasons the evidence seized from those premises should be suppressed.

POINT III

THE MAGISTRATE DID NOT MAKE THE PREDICATE FINDINGS WHEN ISSUING THIS SEARCH WARRANT.

Section 77-23-203, Utah Code Annotated (1953 as amended) states:

> Conditions precedent to issuance.
> (1) A search warrant shall not issue except upon probable cause supported by oath, or affirmation, particularly describing the person, or place, to be searched, and the person, property, or evidence to be seized.
> (2) If the item sought to be seized is evidence of illegal conduct, and is in the possession of a person, or entity, for which there is insufficient probable cause, shown to the magistrate, to believe that such person. or entity, is a party to the alleged illegal conduct, no search warrant shall issue except upon a finding, by the magistrate, that the evidence sought to be seized cannot be obtained by subpoena, or that such evidence would be concealed, destroyed, damaged, or altered if sought by subpoena. If such a finding is made, and a search warrant issued, the magistrate shall direct, upon the warrant, such conditions that reasonably afford protection of the following interests of the person, or entity, in possession of such evidence:

(a) protection against unreasonable interference with normal business;
(b) protection against the loss, or disclosure, of protected confidential sources of information; or
(c) protection against prior, or direct, restraints on constitutionally protected rights. (emphasis added)

Subsection 2 of said Code requires the magistrate to make a finding that the evidence would be concealed, destroyed, damaged, or altered, if sought by subpoena. No such finding was made. Also, the Affidavit in this case, as demonstrated above, fails to tie to the address given in the affidavit.

Subsection 2 also requires the magistrate to make findings if the evidence cannot be obtained by subpoena. No such findings were made in the search warrant. With the magistrate having failed to make the code required findings per said code, section 77-23-203, the Search Warrant must fail, and the evidence obtained, thereby, should be suppressed.

In addition, the officers apparently waited five days, after the Search Warrant issued, before they executed same, which shows that no emergency existed.

For those reasons alone, the Search Warrant must fail and the evidence should be suppressed.

POINT IV

THE "NO NOTICE", AND "NIGHT TIME ENTRY", AUTHORITY, IN THE SEARCH WARRANT, IS NOT SUPPORTED BY FACTUAL ALLEGATIONS IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT.

The only statement in the Affidavit, given by the Affiant, in support of the authorization to enter the "residence", without giving notice, is as follows: "I

request that this warrant be executable, day or night, and without notice, due to the fact that an approach and entry, at nighttime, is safer for officers, suspects, and bystanders, due to the element of surprise, and the suspected controlled substance could easily be destroyed, altered, concealed, or removed from the residence; also, the hazards of unknown chemicals may be used as an act of deadly force by a suspect, if thrown, or mixed together, when officers are detected. The cover of darkness may also aid in providing for officers' safety by delaying the occupants of the above address from also detecting the approach of the officers, prior to entry, and providing "cover", should the occupant choose to employ violent measures to protect their laboratory, and / or their controlled substance". That language is conclusory, only, and does not justify entry into the residence without notice.

In the ADDITIONAL PROBABLE CAUSE section of said Affidavit, the officer did state the following:

> Also, John Bangerter has a history of violence, threatening and resisting law enforcement; he is also the leader of a Skin Head group, know as the "Army of Israel", which is also a Christian Identity group. He has strong anti–government beliefs and has stated, in the past, that he will take the lives of government officials, police included, if he feels they are infringing on his constitutional rights, especially the right to keep and bear arms. He stated to Det. Farnsworth, in the past, that he was a fugitive from justice, because he was facing a felony charge, and would lose his right to bear arms, which was unacceptable to him. (Mr. Bangerter is not a fugitive at this time, although he is on supervised probation with Adult Probation and Parole.) He has also been know to fortify his dwelling, so as to prevent the police from entering his residence with a search warrant.

However, there is nothing in the Affidavit that indicates that Johnny Bangerter resided at, or was a regular occupant of, the premises at 462 South 100 West, St. George, Utah.

Unlike the *Rosenbaum* case, 845 P.2d 962, (Utah App. 1993), the instant

Affidavit does not mention that firearms had been observed at the residence, that the target had been seen possessing firearms, that the Affiant's training, and experience, led him to believe that drug traffickers frequently possess firearms and refuse to open their doors for persons unknown to them, or any of the other things listed in the *Rosenbaum* opinion, supra, which led Judges Greenwood, Gaff, and Jackson to conclude that sufficient probable cause was stated in that Affidavit to support the no notice authorization in the *Rosenbaum* search warrant.

U.S. v. George Anthony Stewart, 867 F. 2d 581 (10th Cir. Ct. App. 1989) is a case that bears on this issue. At page 4 of that opinion, the Court stated:

> The requirement of prior notice of authority, and purpose, before forcing entry into a home, is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in [U.S.C. 18 §] 3109 the reverence of law for the individual's right of privacy in his house.

Likewise, the Utah Legislature has codified that deeply rooted principle in section 77-23-210, Utah Code Annotated (1953 as amended):

> Force used in executing warrant when notice of authority is required as a prerequisite.
>
> When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment, or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:
>
> (1) if, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or
>
> (2) without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person, if notice were given. (emphasis added)

Apparently, no such proof was submitted to the issuing magistrate.

With the Affidavit failing in those respects, the search warrant must fail as being unconstitutional.

POINT V

THE PURPORTED WARRANT IN THIS CASE WAS NOT A LAWFUL WARRANT, BUT NOTHING MORE THAN A CONSTITUTIONALLY PROHIBITED "GENERAL WARRANT".

In *United States of America v. Foster*, 100 F.3d 846 (10th Cir. 1996), the United States Court of Appeals for the Tenth Circuit, dealt with a search warrant which authorized a search of Foster's residence for the presence of marijuana, a Remington 12-gauge shotgun bearing a certain serial number, a Taurus *85* 38 special pistol with a certain serial number, a 22-caliber Ruger carbine with a specified serial number, and a 22-caliber carbine with a green folding stock with a certain serial number.

The officers arrived at the home and began to execute the search warrant. They located marijuana in the bedroom, and found firearms, ammunition, and drug paraphernalia throughout the residence and the barn.

Over a period of several hours, the officers also located other "evidence", including a number of video tapes showing Mr. Foster involved in sexual acts with his stepdaughter, showing his use of marijuana, including one scene involving three or four young females smoking marijuana on the couch in his living room. All of the "evidence" was seized, including that which was not

listed in the search warrant. The search of Foster's residence lasted from 3:25 o'clock p.m., until approximately 11:00 o'clock p.m. Although the warrant specifically identified the items they were to be seized, when the officers left, they took 35 items with them, "including various firearms, ammunition, video tapes, marijuana, drug paraphernalia, and other miscellaneous items". The officers also seized anything of value in the house.

Foster was charged in a 12-count superseding indictment with various violations of United States Law. He moved to suppress all property seized during the search because the search "substantially exceeded the scope of the warrant and there were flagrant disregard for the terms of the warrant as to the property to be seized". Paragraph on motion, the District Court suppressed the evidence, including those items specifically listed in the warrant. Under the law in the Tenth Circuit, even evidence which is properly seized pursuant to a warrant must be suppressed if the officers executing the warrant exhibit flagrant disregard for its terms.

The Tenth Circuit Court of Appeals held that the basis for blanket suppression when a search warrant is executed with flagrant disregard for its terms is found in our traditional repugnance to "general searches" which were conducted in the colonies pursuant to writs of assistance.

The Tenth Court of Appeals quoted the United States Supreme Court in the case of *Marron v. United States*, 275 U.S. 192, 196 (1927), and stated:

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure

of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The Tenth Court of Appeals went on to state:

> "Therefore, *Medlin II* establishes that "[w]hen law enforcement officer grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant."

Finally, on its face, the search warrant issued in this case is a constitutionally prohibited general warrant because of its failure to define, specifically, the purported evidence to be seized, and its consequent authorization of a general search, due to its absence of required particularity.

One may assume that the instrumentalities of a crime will likely be found at, or near, the location where the offense was committed, or in the perpetrator's possession. Indeed, it has been noted "[a] description of instrumentalities or evidence in general terms raises the possibility that there does not exist a showing of probable cause to justify a search for them." 2 *LaFave*, at 575. On the other hand, at one time it was held that a warrant could not be issued for the seizure of "mere evidence". See generally, 1 *LaFave* § 2.6(d). This is no longer a rule of law, but remains an expression of the fact that if "mere evidence" cannot be described with particularity, the assumption of its existence seldom constitutes probable cause. As Professor LaFave has noted "Quite obviously, a distinction must be drawn between instrumentalities and evidence where the description is limited to the type of criminal conduct involved; while, as noted above, this may sometimes be sufficient as to instrumentalities, it of course is not sufficient as to evidence." 2 *LaFave,* at 568.

The description of things in a warrant limits the permissible intensity and duration of the search. Once the items, which are particularly described, have been located and seized, the officers executing the warrant must terminate their intrusion. See generally, 2 *LaFave* § 4.10(d). They cannot extend their authority by drafting a warrant which fails to describe, with particularity, the evidence of which they are aware; substituting, therefore, the statutorily defined categories of seizable instrumentalities and evidence.

In his Affidavit, in the instant case, the officer disqualified the ensuing warrant, as a lawful document, by including the laundry list of elements found in the attachment, "C–2". The inclusion of "C–2" essentially altered the warrant, that the affidavit sought to support, destroying the particularity required, in terms of probable cause, along with the constitutionality of the warrant. Therefore, all evidence resulting therefrom should be suppressed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Search Warrant, herein, should be quashed as being violative of both the United States and Utah Constitutions, and the Court should suppress the evidence seized from the premises described in said Affidavit.

The officer's information regarding various equipment found in the trunk of the vehicle is of a third party nature. Ironically, this information should have precluded the search warrant for the residence and made the County Dump the subject of the search.

The officer offered no accounts of drug transactions at the residence; only third hand accounts of individuals coming and going there, who, he was told,

were known to be part of the drug culture, and that is hardly sufficient for the issuance of a search warrant to search someone's home.

Was Delanie's father, who reported finding the materials in the trunk, and who likely frequented the company of his daughter, who was known to be into drugs, also one of these who could be considered guilty by association? If so, how is CS#1's source's veracity to be assessed, in that CS#1's source was purportedly "close" to the Bangerters, and had visited them at the subject residence to loan them "property"?

One must ask, what are the motivations of CS#1, CS#2, and their "sources"? Is their information born out of self interest? Though we are assured by the officer, in his Affidavit, that neither received financial remuneration, in exchange for their information, have they received other valuable consideration, relating to their own legal travails? There may be no end to guilt by association.

Have the informants, by offering their information, ameliorated their own criminal histories, or their outcomes, thanks to an extorting, or deal wheeling officer?

Without asking these questions, without requiring their answers, prior to the issuance of a warrant, why should we bother with the false formality of an affidavit, or a warrant, at all? Why should authorities require any kind of "sources", or "information", prior to search? Why should the Fourth Amendment stand before any action is taken, based solely upon an officer's hunch, his contrived, or unverifiable, hearsay, or maybe even his dream?

The warrant issuing magistrate listed no findings, as acknowledged by the judge presiding over the hearing. Therefore, the Affidavit produced no material in support of the necessary findings required for a lawful search warrant.

Consequently, any evidence seized, any statements, or admissions against interest, and any sentence resulting therefrom, should be considered invalid. Defendant, therefore, respectfully prays this Court finds that the evidence should be suppressed, along with all elements related thereto, as fruits of the infamous poisonous tree.

Dated this 10th day of December, 2001.

Jim R. Scarth

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's / Appellant's Brief, was mailed this 10th day of December, 2001, to:

Mark Shurtleff
Utah Attorney General
Kent M. Barry
Assistant Attorney General
160 East 300 South – 6th Floor
Salt Lake City, Utah 84114-0854
Attorney for Plaintiff /Appellee

Jim R. Scarth

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff / Appellee,** **vs.** **JOHN WINSTON BANGERTER,** **Defendant / Appellant.**	**Case No.: 20010039-CA** **ADDENDUM TO** **BRIEF OF APPELLANT**

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT [R.68–71]
NUMBERED PARAGRAPHS FOR REFERENCE.

SEARCH WARRANT [R.11–12]

IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff vs. In the Matter of Criminal Investigation	)	AFFIDAVIT IN SUPPORT OF SEARCH WARRANT Criminal No.

STATE OF UTAH	)	
ss.	)	
COUNTY OF WASHINGTON	)	

The undersigned Affiant, Detective Chris Trani, appearing personally before me and having been sworn, states on oath:

1. OFFICER IDENTIFICATION. That I am employed by the St. George Police Department as a Peace Officer, and have been so employed since January of 1993. I have been a narcotics detective since November of 1995 and I am currently assigned to the Washington County Drug Task Force. I have attended two eighty (80) hour Drug Academy courses sponsored by the Utah Police Academy, another forty (40) hour Drug Academy class sponsored by the D.E.A., a forty (40) hour Clandestine Laboratory Certification Course sponsored by the Utah Department of Public Safety, a forty (40) hour Clandestine Laboratory Certification Course sponsored by the D.E.A., and within that past four years, over one hundred (100) hours of drug related training by the Utah Narcotics Officers Association. I have also successfully completed an eighty (80) hour Drug Recognition Expert course sponsored by the Utah Highway Patrol and the National Highway Transportation Association. I have also had numerous (over 50) hours of drug related training from the Utah Gang Investigators Association, the California Gang Investigators Association and the Nevada Gang Investigators Association. I also completed another 28 hours of training related to Outlaw Motorcycle Gangs and their drug involvement. I have also been involved in numerous drug related investigations to include, under cover buy operations, clandestine manufacture of methamphetamine, street level dealing operations, marijuana grow operations, street level drug arrests, etc. along with numerous interview and interrogation courses and hundreds of hours of training related to police work in general.

I am a certified narcotics investigator for the state of Utah and I am certified by both the state of Utah and the D.E.A. as a clandestine laboratory investigator.

2. EVIDENCE/ITEMS TO BE SEIZED. The items for which a search warrant are sought are described as follows: Methamphetamine, a controlled substance and it's related paraphernalia, laboratory equipment, and any precursors used for the manufacture of a controlled

substance. Also any records indicating possession or purchase of controlled substances, laboratory equipment, products, components, precursors, or instructions commonly associated with the manufacture or distribution of a controlled substance, as well as items listed on attachment
"C-2".

3. LOCATION OF SEARCH. I have probable cause to believe these items are on the premises described as: 462 South 100 West in St. George, Utah. This is a single family brick dwelling. The front door of the residence faces East, there is also a second door visible from the street and it faces South. There is a driveway on both the North and South sides of the residence. The numbers "462" are painted on the curb in front of the residence, the same numbers are also on a mail box which is in front of the residence to the left of the door that faces East.

The search shall also include all related storage areas, outbuildings, locked and unlocked containers, curtilage, vehicles associated with the occupants of the residence, as well as those persons present during the execution of the search warrant. Also the "abandoned" vehicles that are in the back yard of the residence.

Also the persons of Johnny Winston Bangerter (D.O.B. 06-23-69), he is a white male, about 6'01" tall and weighing around 200 pounds. The person of Grant Justin Bangerter (D.O.B. 04-26-73) he is about 5'07" tall and weighs around 195 pounds he is also a white male.

4. GROUNDS. I have probable cause to believe these items were unlawfully obtained and/or possessed, and are evidence of the crimes of: Possession of Methamphetamine, a controlled substance, Manufacture of a Controlled Substance and Possession of Drug Paraphernalia.

1. **5. PROBABLE CAUSE.** The Washington County Drug Task Force has been receiving information on the Bangerter residence from several different sources over the past week. On Feb. 3, 2000 the Task Force received information from Confidential Source (CS, to be referred to as CS#1 from here on out.) who told us that they have been told by two sources about drug activity going on in the above mentioned residence. The CS told us that they were told by a person very close to them that the person went into the Bangerter residence to lend them some property. When this person came back to the CS, they told the CS that they were all (meaning the Bangerters and the people with them in the residence) smoking "glass" in the residence and that there was a lot of glass at the residence. (Glass is a common street name for a more refined smokeable form of crystal methamphetamine.) The person also told the CS that there was another man in visiting the Bangerter residence by the name of Kyle Cornwell. The above mentioned incident took place on Saturday January 29, 2000.
2. The second source that CS#1 got their information from is a person who is very close to the Bangerter family. This person told CS#1 that they had been in the above mentioned residence

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when a methamphetamine cook took place in the kitchen area. The second source told CS#1 that they became scared and left the residence. The second source told CS#1 that there was also a lot of paraphernalia all over the inside of the residence.

3. CS#1 told us that when Kyle Cornwell is at the residence, there is a methamphetamine cook taking place. CS#1 was asked if Mr. Cornwell brought the lab equipment to the residence. We were told that he did not bring the equipment, nor did he leave with it.

4. Det. Randall also received information from a completely unrelated source whom will be referred to as CS#2 from here on out. CS#2 told Det. Randall was told that there was a suspected methamphetamine lab concealed in the trunk of a car that was being driven by Delanie Drake and Kenyon Staheli. Det. Randall asked CS#2 to describe the items in the trunk of the car and why the CS#2 thought they were a methamphetamine lab. CS#2 told Det. Randall that they had been "reading" up on drugs and drug labs because they know Delanie and they knew she was involved in drugs. CS#2 then went on to tell Det. Randall what was in the trunk of the car. CS#2 said there was some tubing, red phosphorus, muriatic acid, a coffee decanter with stains in it, several containers of unknown liquids and what appeared to be flasks along with other items that were wrapped in plastic grocery bags which were then wrapped in masking tape. There was also an item of clothing with a strong odor on which was described as a urine odor. Det. Randall was told that Delanie's father removed the items from the vehicle and discarded them in the trash. (This took place after Kenyon Staheli was arrested while driving the vehicle the items were in.)

5. Further CS#2 told Det. Randall that Delanie frequents the Bangerter residence. They also told Det. Randall that Delanie hangs around a man by the name of Kyle Cornwell who is also at the Bangerter residence a lot. They said Mr. Cornwell drives a yellow motorcycle (bullet bike style).

6. Det. Randall and I spoke with Delanie's father. He explained to us that the vehicle with the items in the trunk belonged to him. The vehicle was released to Mr. Drake, who then proceeded to clean it out. He told us that he did remove several items from the trunk. We asked him to try to remember what the items were. He told us there was a coffee pot, some tubing, a jug of an unknown liquid which he said may be iodine, only after I started to name of chemicals to see if he could remember. We asked if there was any other glass ware or items he could remember. He said no. We asked where the items were. He told me that he threw them into his garbage and it was picked up by the refuse people. Mr. Drake offered to let us search the vehicle again. We looked into the trunk and did not locate any contraband. Det. Randall did detect the odor and sensations in her mouth that she associates with a methamphetamine lab. Mr. Drake told us he would help in any way, then told us what vehicle Kenyon and Delanie were driving that night, which was Feb. 2, 2000.

7. We later located the vehicle Delanie and Kenyon were driving at the above mentioned Bangerter residence. We noticed it at about 11:30PM and it did not leave until after 2:00AM. We also saw a vehicle make a stop at the Bangerter residence while we were conducting surveillance. The vehicle was stopped on a traffic violation. The front seat passenger was Eric Fjermestad, who is known by us to be involved in the local drug culture.

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8. **6. ADDITIONAL PROBABLE CAUSE.** Based on my training and experience, the items described to us by CS#1, CS#2 and Mr. Drake are consistent with the clandestine manufacture of methamphetamine. Further Mr. Cornwell has been the subject of more than one investigation in the past where he was known to be manufacturing methamphetamine in both Utah and Las Vegas, NV. Mr. Cornwell in a well known in the local drug culture as a methamphetamine cook. Mr. Kenyon Staheli was also on the periphery of an investigation the Task Force was conducting where we suspected a methamphetamine manufacture operation was taking place. Also Both Johnny and Grant Bangerter have been investigated for or suspected to be involved in the manufacture of methamphetamine in the past. Also John Bangerter has a history of violence, threatening and resisting law enforcement, he is also the leader of a Skin Head group known as the "Army of Israel" which is also a Christian Identity group. He has strong anti government beliefs and has stated in the past that will take the lives of government officials, police included, if he feels they are infringing on his constitutional rights, especially the right to keep and bear arms. He stated to Det. Farnsworth (in the past) that he was a fugitive from justice because he was facing a felony charge and would lose his right to bear arms which was unacceptable to him. (Mr. Bangerter is not a fugitive at this time although, he is on supervised probation with Adult Probation and Parole.) He has also been known to fortify his dwellings so as to prevent the police from entering his residence with a search warrant.

9. On November 29, 1999 members of the Task Force stopped a subject by the name of Shirl Shane Johnson leaving Mr. Bangerter's residence, Mr. Bangerter was with him when he was stopped. The Task Force had previously been investigating Mr. Johnson for suspected drug activity in the LaVerkin area. When Mr. Johnson was stopped, he had several cases of book matches in the bed of his truck. When we asked what he was doing with the matches, he replied "They are not for what you think." When I asked him what he thought we would think about them, he stammered and replied "They are not stolen property." I called the motel in Hurricane where the matches were from. The owner told me that they were old matches. I told the owner that Mr. Johnson said he got them from a female with the last name of Gubler. I also explained to the owner that the match books could be used in the manufacture of methamphetamine. The owner then told me that they suspected that Ms. Gubler was involved in drugs.

10. Also in my training and experience, controlled substances and their related paraphernalia are often kept on someone's person. I have also found that it is sometimes outbuildings and vehicles. Failure to search the curtilage, storage areas, locked and unlocked containers, vehicles associated with the occupants of the residence, together with the people present during the execution of the search warrant, will likely result in officers missing important evidence.

11. CS#1 has proven their self to be reliable to the Task Force in the past. To reveal their identity would endanger them and ruin their future usefulness, further this source came to us and asked for nothing in return for providing us with the information. CS#2 is personally known by Det. Randall. This person also came to Det. Randall as a concerned citizen although, this person has never provided information in the past, they are not involved in the drug culture and have no reason to provide us with false information. Neither source is being compensated in any way for their information or assistance in this case .

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IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff	)	**SEARCH WARRANT**
vs.	)	
In the Matter of Criminal Investigation Defendant	)	**Criminal No.**

THE STATE OF UTAH TO ANY PEACE OFFICER.

Probable cause appearing from the Affidavit in Support of Search Warrant filed herein;

YOU ARE HEREBY COMMANDED to make an immediate search of the following: I have probable cause to believe these items are on the premises described as: 462 South 100 West in St. George, Utah. This is a single family brick dwelling. The front door of the residence faces East, there is also a second door visible from the street and it faces South. There is a driveway on both the North and South sides of the residence. The numbers "462" are painted on the curb in front of the residence, the same numbers are also on a mail box which is in front of the residence to the left of the door that faces East.

The search shall also include all related storage areas, outbuildings, locked and unlocked containers, curtilage, vehicles associated with the occupants of the residence, as well as those persons present during the execution of the search warrant. Also the "abandoned" vehicles that are in the back yard of the residence.

Also the persons of Johnny Winston Bangerter (D.O.B. 06-23-69), he is a white male,

about 6'01" tall and weighing around 200 pounds. The person of Grant Justin Bangerter (D.O.B. 04-26-73) he is about 5'07" tall and weighs around 195 pounds he is also a white male.

YOU ARE FURTHER COMMANDED to search for: Methamphetamine, a controlled substance, and it's related paraphernalia, laboratory equipment, and any precursors used for the manufacture of a controlled substance. Also any records indicating possession or purchase of controlled substances, laboratory equipment, products, components, precursors, or instructions commonly associated with the manufacture or distribution of a controlled substance, as well as items listed on attachment "C-2".

YOU ARE FURTHER COMMANDED to hold any property seized subject to further order of this Court. This Warrant should be executed as soon as practicable, and is void after 10 days if not served. A verified RETURN and INVENTORY of property seized must be made promptly to the Court.

This Warrant must be executed during daylight hours, after giving notice of authority and purpose, unless special authority is granted below.

~~You~~ are authorized to search DAY or NIGHT.

~~You~~ are authorized to search WITHOUT NOTICE.

DATE 3 Feb 00 TIME 22:16

5TH DISTRICT COURT JUDGE